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IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0085013052/53 :
DISABILITY RIGHTS

ROBERT MAFFIT AND
MYRLE TOMPKINS,

) Case Nos. 1139-2009 & 1140-2009
MONTANA

Charging Parties,

) ORDER GRANTING AND
) DENYING CROSS-MOTIONS
) FOR SUMMARY JUDGMENT
) ON LIABILITY AND SETTING
) A FILING DEADLINE FOR
) BRIEFS ON CERTIFICATION
) OR A DAMAGES HEARING

vs.

CITY OF HELENA,

Respondent.

* * * * *

1. Procedural Background

On June 5, 2008, charging party Robert Maffit and charging party Myrle Tompkins filed a joint complaint and later, on November 18, 2008, a joint amended complaint with the department's Human Rights Bureau, charging that respondent City of Helena discriminated against them because of disability in the provision of public services. Maffit and Tompkins charged that the city discriminated against them each because of disability in the provision of public services when it did not provide accessible voting services (by providing for use of the AutoMARK voting machine) in the Helena Citizens' Council election, re-run in mid-December 2007 and final on January 8, 2008. Maffit and Tomkins alleged that by refusing to provide accessible voting machines for registered voters with sight impairments that substantially limited major life activities (including seeing), of which class they are both members, the city violated Mont. Code Ann. §§49-2-308 and 49-3-205.

On January 14, 2009, the Hearings Bureau received the original and amended complaints from HRB, for contested case hearing proceedings. The notice of hearing, appointing the undersigned Hearing Officer to the cases (assigned separate case numbers by HRB), issued the same day. The city, and thereafter Maffit and Tomkins, acknowledged service of notice of hearing on January 20, 2009 and January 23, 2009. The Hearing Officer issued his "Order Setting Contested Case Hearing Date and Prehearing Schedule" on January 27, 2009.

After three orders rescheduling the cases due to various scheduling problems, the parties, having completed discovery, agreed to submission of liability issues in these cases on cross-motions for summary judgment on liability of the city. Maffit

and Tompkins filed the last brief on the cross-motions on September 24, 2009. The Hearings Bureau contacted the parties to confirm either a date and time for oral argument or a joint waiver of the right to hearing on the motions. On October 27, 2009, the Hearings Bureau received confirmation that the parties waived oral argument and the cases were submitted for decision on the cross-motions.

2. Undisputed Pertinent Facts

Maffit and Tompkins are both blind. Their conditions are permanent, and there is no dispute that they each have a physical disability. They are Helena residents and registered voters and were eligible to vote in the 2007 and 2008 Helena municipal elections. Because of the disability that they each have, they each need an accessible voting machine to complete a paper ballot independently and privately. Lewis and Clark County has had such machines (AutoMARK voting machines suitable for this purpose), since 2006.

City elections in Helena, Montana, are run by Lewis and Clark County, as a matter of black letter Montana law, because the county election administrator is responsible for "administration of all procedures related to registration of electors and conduct of elections." Mont. Code Ann. §13-2-302(2). The Lewis and Clark County Clerk and Recorder conducts Helena municipal elections. The city pays the county for the cost of these elections as well as additional expenses for an election, such as the use of AutoMARK machines. Lewis and Clark County, originally a co-respondent in the complaints by Maffit and Tompkins, settled the claims against it for alleged disability discrimination in public services.

The original Helena Citizens' Council election was held by mail, in conjunction with other city elections, with ballots mailed to the eligible voters on October 19, 2007. Each mailed envelope contained two ballots, one for the Helena Citizens' Council election, the other for all other positions involved in the municipal elections. Voters could return their completed ballots from the date of mailing until 8:00 p.m. on November 6, 2007. There were AutoMARK voting machines available at two locations in Helena during the time that voters could return their ballots. Two machines were available at the Elections Office in the City-County throughout the voting period and two more machines were available at the Capitol Hill Mall for on October 26 and 27, 2007.

The perceived filing deadline for candidates for the Helena Citizens' Council election was October 9, 2007, long after the filing deadlines for the other municipal races and only 10 days before the ballots were sent to the voters. This perceived deadline came from a 26-year old memo prepared by a previous Lewis and Clark County Clerk and Recorder. It took from 4 to 6 weeks for the AutoMARK vendor to

print ballots in a compatible format after the names to go on the ballot were finalized. Although the city had authorized the use of AutoMARK ballots and machines for the municipal elections, the later deadline for candidate filing resulted in the ballots for the Helena Citizens' Council election being prepared on separate, AutoMARK incompatible, sheets.

The City Attorney discovered after the ballots were sent out that the ballots for the Helena Citizens' Council election were not AutoMARK compatible. He then researched the perceived filing deadline and concluded that the actual deadline for filing as a candidate for the Helena Citizens' Council election was the same as the deadlines for the other municipal races (75 days prior to November 6, 2007, the last day to vote).

There was another, unrelated, problem with the Helena Citizens' Council election ballots. Those ballots were organized according to precinct rather than Helena Citizens' Council districts. On October 22, 2007, the City Attorney issued an opinion that the Helena Citizens' Council ballots for the November 6, 2007, election were improper, and that another election should be conducted on December 11, 2007. The city followed the recommendation to redo the election. Because of a legal requirement that the plan for a mail ballot be submitted to the Montana Secretary of State 60 days prior to the election, the date for the election redo was reset for January 8, 2008, with ballots mailed to the eligible voters on December 14, 2007. The city requested this mailing date on October 23, 2007, by a memo to the county election administrator.

On October 23, 2007, there was sufficient time to order AutoMARK compatible ballots for the redo election. The city did not specifically request AutoMARK machine availability for the redo elections in its memo.

The county rather than the city was paying for the redo election, because the county was responsible for the erroneous organization of the Helena Citizens' Council election ballots according to precinct instead of Helena Citizens' Council districts. In the absence of a specific request by the city, the county election administrator decided not to spend the money (an increase of approximately 20% in the overall cost of the redo election) involved in using the AutoMARK machines and compatible ballots. Instead, the county followed the same procedure as it had followed in preparing ballots for the October 19, 2007, mailing of ballots for the Helena Citizens' Council election (except for organization by district instead of precinct).

Had the city's memo requesting a December 14, 2007, mailing for the January redo election included a request for use of the AutoMARK machines and compatible

ballots, the county election administrator would have obtained the ballots and used the machines. Instead, AutoMARK incompatible ballots were used again, and no machines were available for the redo election.

Maffit had met with the city manager in 2006 regarding ADA compliance issues in Helena and had followed up in March 2007 with a letter regarding such issues. Disgusted that he could not cast his vote privately in the redo of the Helena Citizens' Council election, Maffit did not vote.

Tompkins was a vocal supporter of the AutoMARK machine and was instrumental in getting access to AutoMARK machines for demonstrations at the Montana Association for the Blind summer programs at Carroll College starting three years ago. The Lewis and Clark County Clerk and Recorder has had these machines since 2006. Tompkins did vote, returning her ballot for the redo in January 2008, but she had to have another person complete her ballot for her.

3. The Primary Issue for Summary Judgment

In its simplest terms, the claims against the city rest upon whether the city had an obligation, under the peculiar facts of these cases, to make a specific request that, for the redo election, AutoMARK compatible ballots and machines be used. Maffit and Tompkins argued that the city had the statutory obligation to "analyze all of its operations to ascertain possible instances of noncompliance with the policy of [the Governmental Code of Fair Practices Act] and . . . initiate comprehensive programs to remedy any defect found to exist." Mont. Code Ann. § 49-3-205(3). Since the city knew by the time of its October 23, 2007, memo that there was time to produce AutoMARK compatible ballots for the redo election and that an exact "redo" of the Helena Citizens' Council election would not include such ballots and machines, a very simple "comprehensive" response to remedy the previous lack of such ballots and machines would be to make a specific request for them.

The city presented a threefold defense: (1) Absolute ballot secrecy is not necessarily a requirement; (2) Government entities are not always required to provide visually impaired voters with accessible technology to vote completely independently and secretly; and (3) Since the city had asked for AutoMARK machines for the original election and the county was now paying for the redo election, the city had neither the right nor the obligation to specify use of the machines.

3.a. Whether or Not Always Necessary, "Absolute Ballot Secrecy" Was Available in this Instance for Visually Impaired Voters

If it were necessary to the decision, the Hearing Officer would probably agree with the analysis of Maffit and Tompkins about how strongly Montana insists upon

a secret ballot. The city is correct that Montana law allows assistance to a voter who both desires assistance and satisfies the election judges of the need of assistance by a sworn statement of disability. Mont. Code Ann. § 13-13-119(1) through (3). As Maffit and Tompkins point out, the Montana Legislature adopted these provisions in response to the federal Voting Accessibility for the Elderly and Handicapped Act ("VAEH") in 1984. That statute authorizes limited disclosures by voters qualified as disabled who affirmatively request assistance. Otherwise, who a voter votes for remains absolutely secret. Mont. Code Ann. § 13-13-119(5).

Absolute ballot secrecy for visually impaired voters, by resort to AutoMARK machines and compatible ballots, was available for the redo of the Helena Citizens' Council election. Since it was available, and within the power of the city and/or the county to provide, whether absolute ballot secrecy would always be necessary is a moot question for this case. In this case, the local government entity already had the technology to provide absolute ballot secrecy for visually impaired voters and the time to implement the technology for the election at issue. In addition, there is no evidence that the cost of implementation of the technology for this particular election was unduly burdensome. Under these facts, failure to make that technology available to visually impaired voters did violate their rights to a secret ballot.

3.b. Failing to Use Accessibility Technology for the Redo Election that the Local Government Already Possessed and Already Used for Other Municipal Elections Violated Montana Anti-Discrimination Law

The parties ably argued current application of anti-discrimination laws to determine the rights of disabled voters to cast private ballots. The pivotal point, however, is not whether state or federal anti-discrimination law generally requires that local governments use accessibility technology to assure private voting.¹ Instead, the point here is that accessibility technology was already in the possession of and already used by the local government for all of the rest of the municipal elections. That technology was readily available for the redo election. "While the ADA and Rehabilitation Act do not necessarily create a comprehensive federal right to vote without assistance, the application of the ADA and the Rehabilitation Act in a particular case may have the effect of requiring equipment that allows voters to vote without assistance." *American Association of People with Disabilities v. Hood*, 278 F.Supp.2d 1345, 1356 (M.D.Fla. 2003). Montana law has that effect here.

¹ The city cited cases deciding that various anti-discrimination laws did not require using technology that might be available and might work to vindicate disabled voters' ability to cast secret ballots. *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999); *Am. Ass'n People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004); *Taylor v. Onarato*, 428 F. Supp. 2d 384 (W.D. Pa. 2006).

Under Montana law, that a local government has an affirmative duty to review its own policies and practices for discriminatory effect and is prohibited from entering into against any arrangement, plan or agreement that "has the effect of sanctioning discriminatory practices." Mont. Code Ann. §§ 49-3-205(2), (3). The plain language of these provisions requires local governments to do their best to prevent, address and redress discriminatory effect as well as discriminatory practice. In this case, the local government failed to act in accord with that law, although it easily could have.

Like the cases inquiring into whether anti-discrimination laws always require private balloting for disabled voters, cases involving heavy costs or uncertain accuracy of advocated accessibility measures really miss the point of this case. Failure to use AutoMARK technology for the redo election, when it was clearly available (as it had not been during the original election, because of the mistake about candidate filing deadlines), did violate Montana's anti-discrimination law.

3.c. The City Could and Should Have Asked for AutoMARK Technology

Analytically, it appears that the county was the source for the mistakenly extended deadline for candidate filing for the Helena Citizens' Council election as well as the erroneous organization of the ballots according to precinct instead of Helena Citizens' Council districts. However, there is no genuine factual dispute about whether AutoMARK technology would have been available in the redo election had the city specifically requested it. Had the city made that request there might have been a question, to be resolved between county and city, about which local government unit would bear the additional expense involved, but that is irrelevant to the liability questions raised by these cross motions.

The city had the right, and therefore the duty, to specify use of the machines, just as it had done for the original municipal elections (apart from the Helena Citizens' Council races). Settlement of the claims against the county may reduce the importance of affirmative relief requiring the city to make such requests in the future, but it does not moot the city's responsibility for failing to make the request for AutoMARK technology in the redo election.

4. Further Proceedings and Certification of this Decision as Final

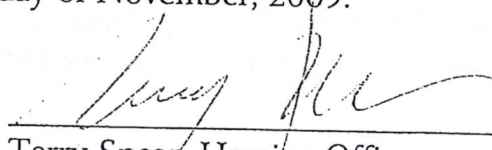
This ruling upon liability is interlocutory. Rule 56(c), Mont. R. Civ. P. There remain questions of what harm, if any, Maffit and Tompkins sustained as a result of the city's illegal discrimination, what reasonable measures the department should order to rectify any such harm and what, in addition to an order to refrain from such conduct, the department should require of the city to correct and prevent similar discriminatory practices in the future.

The parties should first have an opportunity to address whether there should be further hearing proceedings to address those questions before issuance of a Hearing Officer Decision, or whether the current summary judgment ruling should be certified as final for appeal purposes. *See*, Rule 6(6), Mont. R. App. Proc, and Rule 54(b), Mont. R. Civ. P.

5. ORDER

Summary judgment is granted to Maffit and Tompkins, and denied to the City of Helena, on the charges that the city illegally discriminated in provision of local governmental service by failing to request that Lewis and Clark County use AutoMARK technology so that voters with sight disabilities could cast secret ballots in the January 2008 redo election (held by mail) for the Helena Citizens' Council. There remain damage and affirmative relief issues. By the close of business December 4, 2009, each party must file and serve a motion requesting either a scheduling conference to set further proceedings in this case or certification of this order as final for appeal, with a brief and any other materials necessary to support the motion. The Hearings Bureau will contact counsel to set a telephone conference after this filing deadline, to discuss further proceedings.

DATED this 3rd day of November, 2009.



Terry Spear, Hearing Officer
Hearings Bureau

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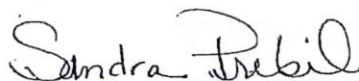
CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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Signed this 3rd day of November, 2009.



Legal Secretary, Hearings Bureau
Montana Department of Labor and Industry